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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-328

RICHARD M. PATCH,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Claims

WILLIAM B. KELLEHER
722 Chestnut Street
St. Louis, Missouri 63101
Attorney for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Claims

Petitioner, Richard M. Patch, petitions for a writ of certiorari to review the decision of the United States Court of Claims entered in this case on June 28, 1974.

OPINIONS BELOW

The opinion of the Court of Claims, printed as Addendum I hereto, is not yet officially reported.

The Court of Claims decision was on appeal from the decision of the United States Civil Service Commission Board of

Appeals and Review (B.A.R.) entered on December 11, 1969. The B.A.R. decision, printed as Addendum II hereto, is not officially reported.

The B.A.R. decision had affirmed the August 29, 1969, finding and recommendation of the Civil Service Commission, St. Louis Regional Office (C.S.C.). The C.S.C. decision, printed as Addendum III hereto is not officially reported.

The C.S.C. decision sustained the decision of Mr. N. B. Coon, Assistant Director for Administration, Bureau of Narcotics and Dangerous Drugs, United States Department of Justice (B.N.D.D.) removing Petitioner from his position as Criminal Investigator by removal letter dated May 20, 1969. This B.N.D.D. decision, printed as Addendum IV hereto, is not officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on June 28, 1974 (Addendum I hereto). The jurisdiction of this Court is invoked under 28 *U.S.C.* § 1255(1) (1948).

QUESTIONS PRESENTED

1. Whether the actions of Mr. N. B. Coon, Assistant Director for Administration of the Bureau of Narcotics and Dangerous Drugs in (a) instituting the charges against Petitioner, (b) appointing his own subordinate to serve as hearing officer on the charges, and (c) acting as judge of those charges within the B.N.D.D. constituted a violation of statutory and constitutional requirements.

2. Whether the actions of Respondent in (a) refusing to present evidence at the Civil Service Commission hearing and

(b) its decision to "stand on" an untranscribed tape recording of a prior evidentiary hearing constituted a deprivation of Petitioner's statutory right to confront, reply, rebut and cross-examine, as a preference eligible veteran, to a full evidentiary C.S.C. hearing.

3. Whether the failure of Respondent to provide a verbatim transcript of a tape recording of a B.N.D.D. hearing and its decision to provide only a summary of the hearing constitutes an impermissible violation of statutory requirements.

4. Whether the hearing officer's failure to require production of thirty-two (32) files allegedly misrepresented by Petitioner, despite demand for their production as pertinent, necessary and indispensable documents; and the hearing officer's admission of testimony of an adverse witness as to the witness's conclusions regarding the contents of the thirty two (32) said files, despite objections, constituted improper violations of the rules of evidence and statutory requirements and constitutional safeguards. And, further, whether the action of the Agency in accepting hearsay testimony as to the contents of its own files, and in refusing petitioner's demands for production of the files in question for confrontation, examination, and cross-examination of the said hearsay testimony, was in conflict with decisions of this court.

5. Whether the Court of Claims properly found that Petitioner's removal from federal employment by administrative action was (1) based upon proceedings which were in substantial compliance with statutory and regulatory requirements, (2) not arbitrary or capricious, and (3) supported by substantial evidence.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Since the provisions involved are lengthy, they are merely cited here, and the pertinent texts are set forth in Appendix A hereto.

Constitutional Provisions:

United States Const. amend V

Statutes:

5 *U.S.C.* § 2108 (1966)

5 *U.S.C.* § 7501 (1966)

5 *U.S.C.* § 7701 (1966)

28 *U.S.C.* § 1255(1) (1948)

28 *U.S.C.* § 1491 (1948)

28 *U.S.C.* § 2675 (1948)

Regulations:

5 *C.F.R.* § 771.214 (1969)

5 *C.F.R.* § 771.215 (1969)

5 *C.F.R.* § 771.217 (1969)

28 *C.F.R.* § 47.7 (1969)

28 *C.F.R.* § 47.8 (1969)

28 *C.F.R.* § 47.9 (1969)

28 *C.F.R.* § 47.10(d) (1969)

STATEMENT OF THE CASE

At all times material hereto, Petitioner was employed as a Criminal Investigator, GS-12, Department of Justice, Bureau of Narcotics and Dangerous Drugs (B.N.D.D.), and was qualified as a preference eligible veteran under 5 *U.S.C.* § 2108 (1966), and entitled to all benefits and protections made and provided for by such status. (App. A.)

By a proposal of removal letter dated March 7, 1969, printed in Appendix B hereto, Petitioner was advised by Mr. N. B. Coon, Assistant Director for Administration, B.N.D.D. that he proposed to remove Petitioner from his position on the basis of three charges specified in the letter. These charges were: (1) Unethical Use of Official Authority, (2) Submission of False Information in Connection with the Conduct of Official Business, and (3) Unauthorized Disclosure of Official Information. By letter dated March 12, 1969, printed as Appendix C hereto, Petitioner answered each of these three charges. In a telephone call from Mr. Coon to Petitioner on March 18, 1969, Petitioner was informed that Mr. Coon would not make a decision in the matter until April 30, 1969, and that if Petitioner desired any hearing on the matter within the B.N.D.D., he would have to make a request by March 25, 1969. A memorandum of this phone call is printed as Appendix D hereto. Petitioner subsequently requested a hearing.

Mr. Coon, the official proposing petitioner's dismissal, appointed his subordinate within the B.N.D.D., Mr. John P. Volz, to conduct the hearing, which was held on April 22, 1969. The entire proceedings were reported verbatim by means of tape recordings, but no verbatim transcript was prepared. Instead, Mr. Volz chose to prepare a summary and make findings of facts sustaining all three charges. This summary prepared by Mr. Volz is printed as Appendix E hereto. William B. Kelleher,

the attorney for Petitioner, made numerous objections to many of Mr. Volz's rulings, including, *inter alia*, objections to Mr. Volz's refusal to require production of thirty-two (32) files relied upon by the Government to prove charge 2, and objections to Mr. Volz allowing certain testimony of Inspector Robert Goe of the Bureau of Inspections, B.N.D.D., concerning his recollections conclusions as to the content of the thirty-two files.

In addition to the objections and reservations of rights made by Mr. Kelleher during and at the conclusion of the hearing, he submitted a letter, dated May 15, 1969, of exceptions to the summary prepared by Mr. Volz. This letter is printed as Appendix F hereto.

By letter of May 20, 1969, Mr. Coon advised Petitioner that he had considered all the evidence before him and had determined that all three charges were found to be sustained, and that therefore Petitioner was removed from employment effective May 23, 1969. This letter is printed as Appendix G hereto.

Petitioner appealed this decision to the St. Louis Regional Office, C.S.C., and a hearing was conducted on July 22, 1969, which resulted in the sustaining of the B.N.D.D. decision. Addendum III. At this July 22, 1969 C.S.C. Hearing the B.N.D.D. agency attorney made the announcement that the agency would produce *no evidence* but elected to "stand on the tapes" of the verbatim recording of the B.N.D.D. intra-agency hearing conducted on April 22, 1969, and Mr. Volz' "summary" thereof. The tapes upon which the B.N.D.D. chose to "stand" were never marked, offered or received into evidence at the July 22, 1969 C.S.C. hearing, or at any other level of Petitioner's appeal.

Petitioner appealed the C.S.C. decision to the B.A.R., which affirmed the Regional Office's decision. Addendum II. Petitioner's appeal to the B.A.R. is printed as Appendix H hereto. The transcript of the B.A.R. hearing before Billie J. Brown is printed as Appendix J hereto.

Petitioner appealed the B.A.R. decision to the United States Court of Claims which, on June 28, 1974, entered its decision, based on briefs and oral arguments, which denied Petitioner's motion for summary judgment and granted Respondent's motion for summary judgment. The Order of the Court of Claims is printed at Addendum I hereto.

The federal jurisdiction in the Court of Claims was invoked under 28 *U.S.C.* § 1491 (1948), and under compliance by Plaintiff with the provisions of 28 *U.S.C.* § 2675 (1948).

REASONS FOR GRANTING THE WRIT

The Petitioner contends that the administrative procedures utilized in effectuating his removal from federal employment, beginning with the B.N.D.D. decision-making process and continuing through the C.S.C. decision and the B.A.R. decision, have so far departed from the accepted and usual course of proper administrative proceedings as to call for an exercise of this court's power of supervision. The constitutional, statutory, and regulatory improprieties and irregularities involved in this case are such that they have resulted in the creation of a record which on its face clearly shows (1) lack of substantial compliance with applicable requirements, (2) arbitrary and capricious action on the part of various officials below, and (3) lack of substantial evidence to support the removal, and (4) is in conflict with applicable decisions of this Court in that the findings and judgment herein challenged are based upon alleged facts from files of the dismissing agency without introducing the files in evidence.

The order of the Court of Claims has so far sanctioned such a departure from the accepted and usual course of proper administrative proceedings as to call for an exercise of this court's power of supervision in order to protect Petitioner's rights.

This record is so rife with irregularities and so permeated with the taint of unfairness as to urgently require review by this court. The totality of this record discloses a callousness on the part of the administrative officialdom which approaches the proportions of a vendetta against Petitioner. The heavy-handed manner in which Petitioner was treated throughout these proceedings and the cavalier disregard for even the semblance of fair play stand as a shocking testament to the inherent potential for abuse which exists within this procedural system.

One, or even several minor technical evidentiary errors standing alone may not be sufficient to establish a denial of due

process, but when all the facts and circumstances combine, as they do here, to produce such a blatant scenario of the denial of fundamental fairness, this Court's consideration is necessitated. Here certain officials decided that they wanted Petitioner removed. In a removal procedure replete with arbitrary and unreasonable actions this goal was achieved. This in itself is deplorable enough, but when coupled with the complete inability of the appellate process to rectify the errors, the entire record discloses a shocking denial of justice to the Petitioner.

The following areas in particular show how this courts supervisory power is required to protect Petitioner's rights.

1. Mr. Coon's actions in performing the functions of both accuser and judge within the B.N.D.D. decision-making process clearly are a violation of 28 *C.F.R.* § 771.214 (1969), and the Fifth Amendment Due Process guarantees. *See* App. A for texts of these provisions.

28 *C.F.R.* § 47.10(d) (1969) prohibits the official making the adverse decision from also deciding the appeal, but that, in effect, is what Mr. Coon has done here. After the initiation of charges in Mr. Coon's March 7, 1969, letter (App. B), and Petitioner's answering letter of March 12, 1969 (App. C), Mr. Coon was required by 5 *U.S.C.* § 7501(b)(4) (1966) to make "a written decision on the answer at the earliest practicable date." Petitioner was notified by Mr. Coon's March 18, 1969, telephone call (App. D) that such a decision would not be made until April 10, 1969.

Petitioner's responses during the telephone conversation and his letter of March 12, clearly show that Mr. Coon led him to believe that if a hearing was not requested by March 25 (*i.e.*, fifteen days from his receipt of Mr. Coon's letter), then his "right to a hearing within the Department of Justice may be forfeited." (App. B). Therefore, Petitioner was led to believe that in order to preserve his right to any departmental

hearing on Mr. Coon's decision he was required to request the hearing before the decision was even made.

If Mr. Coon had complied with the statutory mandate of 5 *U.S.C.* § 7501(b)(4) (1966), and had timely made his decision based on the charges and answer, the April 22, 1969, B.N.D.D. hearing would clearly have been a departmental appeal and Mr. Coon's subsequent removal decision of May 20, 1969 (Addendum IV) would clearly have resulted in his performing as the official deciding the appeal and as the official who made the adverse decision. The fact that Mr. Coon failed to make the required adverse decision at the "earliest practicable date" should not preclude Petitioner from claiming the protections afforded by 28 *C.F.R.* § 47.10(d) (1969).

5 *C.F.R.* § 771.214(a) (1969), requires that the method for selecting members for the hearing committee insure that the members are fair, impartial and objective. This requirement was clearly violated by the fact that the hearing officer selected by Mr. Coon was Mr. Volz, who was Mr. Coon's subordinate in the B.N.D.D. Since Mr. Volz's function as hearing officer was to accept and review evidence and advise Mr. Coon as to whether Mr. Coon's own charges were well taken, the procedure involved here, far from "insuring" fairness, impartiality and objectivity, serve instead as an invitation to unfairness, partiality and lack of objectivity.

The procedures utilized in the B.N.D.D. decision-making process here are, in effect, a circular conduit: Mr. Coon accused; Mr. Coon appointed his subordinate to hear the case and make recommendations; and Mr. Coon was the judge of his own charges. This type of procedure clearly results in a denial of due process and lack of fairness similar to procedures which were invalidated in *In re Murchison*, 394 U.S. 193 (1955), where a single individual acted as both Grand Jury and judge in the same case, and in *Camero v. United States*,

179 Ct. Cl. 520, 375 F.2d 777 (1967), where the prosecutory and adjudicatory functions were improperly mixed in an administrative removal situation.

Once the administrative agency has afforded a hearing, it must be conducted in accordance with due process requirements. The principles enunciated in *Goldberg v. Kelley*, 397 U.S. 254 (1970), and *Morrissey v. Brewer*, 408 U.S. 471 (1972), which involve, respectively, due process requirements in hearings prior to the termination of welfare benefits and revocation of parole, are applicable here. Those cases require an "independent decision-maker" to evaluate the basis for the termination.

Mr. Coon, as the officer directly involved in making recommendations concerning Petitioner's removal, cannot have complete objectivity in evaluating those recommendations, and even though he did not personally conduct the hearing, his dual capacity as accuser, and judge of the validity of his own accusations, negates the possibility of an "independent decision-maker."

2. Plaintiff, by virtue of his status as a preference eligible veteran, had the right to appeal to the Civil Service Commission; the right to a meaningful evidentiary hearing by the C.S.C.; and, "after investigation and consideration of the evidence submitted," 5 *U.S.C.* §§ 7501, 7701 (App. A) a finding and recommendation based thereon. The C.S.C. hearing held on July 22, 1969, was not the type of hearing contemplated by the statute, in that Respondent produced no evidence to support Petitioner's removal, but elected to "stand on the tape." The tape referred to was a tape recording of the earlier B.N.D.D. hearing and was not presented, marked, or accepted into evidence at the C.S.C. hearing, and was not before the hearing officer at that C.S.C. hearing. The procedures employed at the C.S.C. hearing do not amount to the full evidentiary hearing required by the statutory provisions cited *supra*.

3. 5 *C.F.R.* § 771.217(a) and 5 *C.F.R.* § 771.217(b) (App. A), require that when the hearing is "reported verbatim" a full transcript must be prepared, made a part of the record, and furnished to the employee. Thus the hearing committee has the option of reporting the hearing verbatim, in which case the transcript must be made, or not reporting it verbatim, in which case only a summary need be prepared.

In the B.N.D.D. hearing, the committee chose to make a verbatim report of the hearing through the use of a tape recording, and consequently was also required to make a full transcript, make the transcript a part of the record, and furnish a copy to the employee. No such transcript was prepared, made a part of the record, or furnished to Petitioner, in clear violation of the regulations cited *supra*.

Petitioner was thereby prejudiced in that there is no verbatim record of the B.N.D.D. hearing available by which he can demonstrate specific points of error creates by the particular language used by the parties, counsel, the witnesses, and the hearing officer.

The written summary which *was* prepared reflects the recollections and conclusions of the hearing officer and despite the fact that Petitioner disputes the accuracy of several portions of the summary, it was the summary only—not a verbatim record —which was relied upon throughout the appellate process, both within the administrative agency system and in the Court of Claims.

4. Charge 2 against Petitioner involved his alleged submission of false information in relation to thirty-two (32) specified documents. At the B.N.D.D. hearing an adverse witness, B.N.D.D. Inspector Goe, was allowed to testify as to his interpretation and recollection of the content of the documents despite Petitioner's objections that such testimony violated the hearsay rule and best evidence rule. Petitioner repeatedly de-

manded that the documents themselves be produced but was told that they would not be produced unless and until Petitioner could specifically show how each of the documents withheld by the agency would impeach Goe's hearsay testimony. Such a showing would have to be made by Petitioner *prior to* any access to the documents in question.

Without being afforded the opportunity to be confronted with and inspect the allegedly misrepresented files for the purpose of cross-examination, this was clearly an impossibility, and a shocking disregard of Petitioner's constitutional right to confrontation and cross-examination.

Because of these rulings by hearing officer Volz, Petitioner was effectively denied the opportunity to prove or disprove anything relating to the alleged submission of false information.

5 *C.F.R.* § 771.215(b) (1969), and 28 *C.F.R.* § 47.8(b) (App. A), both require the production of "pertinent documents" and since the thrust of charge 2 is Petitioner's alleged misrepresentation of the contents of these documents, they are not only clearly "pertinent" to the charge, they are in effect the *only* evidence as to the alleged misrepresentation of their content. This is true despite the fact that all rules of evidence need not be strictly followed in administrative hearings of this type. 5 *C.F.R.* § 47.8(c) (App. A).

5 *C.F.R.* § 47.8(c) provides

> "Rules of evidence need not be followed, but evidence should be pertinent to the issues."

This section is clearly a reiteration of a long standing practice in the field of administrative law of not requiring that all of the formalities required in court room practice need not be meticulously observed before administrative tribunals. It was *not* and is not legislative or judicial intent that this Regulation serve as

the basis for administrative bodies, or reviewing legislative courts, to create or condone the star-chamber result achieved herein, by denying petitioner his right of confrontation and cross-examination of the very documents he is charged with misrepresenting. Such an interpretation of this regulation would effectively deny to the entire class of U. S. Civil Servants, and to petitioner in particular, due process of law and equal protection of the law, for the sole reason that this class, and this petitioner had been unwise enough to choose a career in the U. S. Civil Service.

In the opinion of the U. S. Court of Claims (Addendum I) the Court makes the following statement at page 2 thereof. "Plaintiff failed to cross-examine on this point even when the opportunity to inspect some 32 files in question was provided." This statement is absolutely and totally inaccurate and untrue. Not only is it not borne out in the record, it is clearly shown to be inaccurate in Mr. Volz summary. (App. E).

The failure to produce the very documents upon which the charge is based, and allowing such hearsay testimony as to their contents from an adverse witness also results in a violation of Petitioner's right to a full and fair evidentiary hearing as guaranteed by 28 *C.F.R.* § 47.7 (1969) and 5 *U.S.C.* § 7501 (1966).

In this connection, the principle stated in *Green v. McElroy*, 360 U.S. 474, 496 (1959), in particularly apt here, as it applies to examinations and cross-examination of both documentary and individual testimony:

> [W]here the government action seriously injures an individual, and the reasonableness of the action depends on fact-findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is more important where evidence consists of the testimony of individuals whose memories might be faulty or who in fact

might be prejurors or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy.

Finally, the opinion of the Court of Appeals in approving and condoning as "proof", "facts" conceivably "known" to the Administrative body from its files, but not put into evidence these files so as to permit scrutiny and contest is in conflict with rulings of this court in *Vitarelli v. Seaton*, 359 U.S. 535, 3 L.ed. 2d 1012, 79 S.Ct. 968; *Crowell v. Benson*, 285 U.S. 22, 76 L.ed. 598, 52 S.Ct. 285; and *Philadelphia Co. v. Securities & Exchange*, 337 U.S. 901, 93 L.ed. 1715, 69 S.Ct. 1407.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

WILLIAM B. KELLEHER
Attorney for Petitioner

September, 1974.

Certificate of Service

I hereby certify that on this 20th day of September, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to The Solicitors General, Department of Justice, Washington D.C. 20530.

. . . . . .

William B. Kelleher
722 Chestnut Street
St. Louis, Missouri 63101
Counsel for Petitioner

ADDENDUM

ADDENDUM I

In the United States Court of Claims

No. 429-72

Richard M. Patch

v.

The United States

Before Nichols, *Judge*, Presiding, Kashiwa and Bennett, *Judges*.

ORDER

This case comes before the court on plaintiff's motion, filed September 5, 1973, for summary judgment and on defendant's cross-motion, filed January 7, 1974, for summary judgment. The case has been submitted on the briefs and oral argument of counsel.

Based on the record, briefs, and oral argument of counsel, we find (1) that the proceedings were in substantial compliance with statutory and regulatory requirements, (2) that the removal of plaintiff by the agency was not arbitrary or capricious action, and (3) that the decision was supported by substantial evidence.

Some of plaintiff's points raised in this court were not raised before the Civil Service Commission Board of Appeals and Review. Plaintiff is precluded from doing this by the doctrine

of exhaustion of administrative remedies. *Haynes v. United States*, 190 Ct. Cl. 9, 12-13, 418 F. 2d 1380, 1382-1383 (1969).

Plaintiff complains that the contents of 32 Bureau of Narcotics and Dangerous Drugs files were allowed into evidence over his hearsay and best evidence rule objections. We find that this argument has no real merit. 28 C.F.R. 47.8(c) does not require a strict following of the rules of evidence in the conduct of a hearing. Where allowed by regulation, hearsay evidence has long been deemed admissible in administrative proceedings. *Consolidated Edison Co. v. N.L.R.B.*, 305 U. S. 197 (1938). See, also, *Jacobowitz v. United States*, 191 Ct. Cl. 444, 452, 424 F. 2d 555, 559 (1970). We see no error in the hearing officer's ruling which provided plaintiff the opportunity to challenge an Inspector Goe's testimony with respect to the number of cases in which two parties were listed as informants. Plaintiff failed to cross-examine on this point even when the opportunity to inspect some 32 files in question was provided. The hearing was conducted in compliance with 5 C.F.R. 771.215(b) and 5 C.F.R. 47.8(b).

It Is Therefore Ordered that plaintiff's said motion for summary judgment, filed September 5, 1973, be and the same is denied; defendant's cross-motion for summary judgment, filed January 7, 1973, be and the same is allowed; and plaintiff's petition is hereby dismissed.

By the Court

/s/ PHILIP NICHOLS, JR.
Judge, Presiding

June 28, 1974

ADDENDUM II

United States Civil Service Commission
Board of Appeals and Review
Washington, D. C. 20415

DECISION

In the Matter of
Robert M. Patch

Type Case: Removal.

Introduction

Mr. Patch, through his attorney, has appealed from the decision of the St. Louis Region, U. S. Civil Service Commission, dated August 29, 1969, which sustained the action of the Department of Justice, Bureau of Narcotics and Dangerous Drugs, in removing him from the service effective May 23, 1969.

Statement of the Case

The appellant was employed as a Criminal Investigator, GS-12, $12,986 per annum, Department of Justice, Bureau of Narcotics and Dangerous Drugs, Regional Office, duty station: Kansas City, Missouri. Mr. N. B. Coon, Assistant Director for Administration, by advance notice of March 7, 1969 proposed to remove the appellant from the service based on charges 1. unethical use of official authority; 2. submission of false information in connection with the conduct of official business; and 3. unauthorized disclosure of official information. After considering the appellant's written reply of March 12, 1969 to the charges, the hearing officer's report of his findings of fact, dated May 7, 1969, and the exceptions to this report made by the appellant's

attorney, dated May 15, 1969, Mr. Coon issued his decision to remove dated May 20, 1969 based on the three charges which were sustained, except for the portion of the specification alleging that Gregory Taylor was not an informant of the Bureau under charge 2.

First Level Decision

A timely appeal was made to the Commission's St. Louis Region which held a hearing on July 22, 1969 and thereafter issued its decision dated August 29, 1969. The Region found that the procedure followed by the agency was within the limits of the agency and the Civil Service regulations on processing adverse actions. The Region stated that the procedure used appeared to have resulted from an attempt by the agency to reserve all decisions relative to adverse action, including the initiation of action, at the level of Assistant Director of Administration, rather than delegating the authority for taking such actions to lower levels and that this showed an effective management means of assuring that top level attention is given to important decisions regarding adverse actions. On substantive grounds, the Region found that the charges were substantiated and that the three sustained charges were of such serious nature as to impair the appellant's performance of his official duties and warranted the penalty of removal.

Appeal to the Board of Appeals and Review

The appellant renews the contentions regarding the procedure used, which he alleges amounted to a basic deprivation of his "due process of law," and regarding the evidence relied upon to substantiate the charges.

Analysis and Findings

The Board of Appeals and Review has reviewed the entire record in this case, including the further representations of the appellant and of the agency to the Board. The appellant's contention that the agency procedure in taking the adverse action deprived him of due process is based on the allegation that, since Mr. Coon preferred the charges, appointed the hearing officer and then made the decision to remove him, Mr. Coon was accuser and also final judge, with his subordinate acting only as an interim fact finder. Neither the Civil service regulations nor the agency regulations required that the adverse action taken against the appellant be initiated by an official other than the official who made the decision in the appellant's case.

The right to reply personaly or in writing, or both, to the official authorized to make the decision, or to a representative designated by the official to hear the employee's reply, and to have his reply considered is a fundamental right afforded to the employee. On the subject of the employee's answer, it is stated in FPM Supplement 752-1, subchapter 2-4, that the right to answer personally does not include the right to a trial or formal hearing with examination of witnesses. Some agencies do provide for a hearing prior to issuing the decision on the proposed adverse action.

In the advance notice of proposed removal dated March 7, 1969, the appellant was informed of his right to reply personally and in writing and of his right to request a hearing under Department of Justice regulations (28 CFR 47.7). The record reflects that following receipt of the appellant's written reply of March 12, 1969, *Mr. Coon telephoned the appellant on March 18, 1969 at which time Mr. Coon advised the appellant that he* (Coon) *had not reached his decision* and that if the appellant wanted a hearing, the appellant should make his request in writing within 15 days from March 10, 1969. The

appellant indicated in letter of March 18, 1969 that he desired a hearing. The record contains copies of correspondence relative to the witnesses to be present at the hearing and the material pertinent to the charges.

Mr. John P. Volz, Special Agent, BNDD, New Orleans, Louisiana, presided as hearing officer at the hearing held on April 22, 1969; the appellant as well as management's and the appellant's witnesses furnished testimony on direct and cross-examination; and thereafter Mr. Volz under date of May 7, 1969 submitted his summary of the hearing testimony, and his findings of fact and recommendations to Mr. Coon, with copies thereof being sent to the appellant's and management's representatives. *The hearing summary contains the statement that all parties noted for the record that the hearing had been conducted fairly and that no* one had *any objections as to the manner in which the hearing was conducted.* Mr. William B. Kelleher, attorney for the appellant, in letter of May 15, 1969 to Mr. Coon, submitted exceptions to the findings of fact and recommendations concerning the charges made by Mr. Volz. Mr. Coon, by letter of May 20, 1969, notified the appellant of his decision to remove the appellant from the service on May 23, 1969 based on his (Coon's) determination that the charges contained in the notice of proposed removal were sustained and warranted the appellant's removal.

As a result of a careful review of the procedures followed by the agency in processing the removal action, the Board finds that the procedures violated no right to which the appellant was entitled under either civil service or agency regulations. Specifically, there is nothing in section 47.7(b) of title 28 of the Code of Federal Regulations, and in Personnel Methods Series No. 16, January 1968, entitled "Conducting Hearings on Employee Appeals," published by the Civil Service Commission, which required the agency to follow a procedure different from that used in taking adverse action against the appellant.

The decision of the Commission's St. Louis Region, dated August 29, 1969, discussed the pertinent facts presented by the record in the appellant's case, and in the opinion of the Board the material issues regarding the charges were properly developed by the Regional Office. The substance of charge 1, unethetical use of official authority, is that the appellant on June 2, 1967 went to Detective Sergeant Crain of the St. Louis, Missouri, Police Department, from whom he obtained the sum of $1525.84 which had been in the possession of one Andrew Lee Lyles when he was arrested on this date, and that the appellant stated that the money would be turned over to the Internal Revenue Service to be held for income tax investigation. It was stated that a search of IRS records conducted in November 1968 failed to disclose receipt by that office of a payment in that amount in connection with a jeopardy assessment asserted against Lyles; that a further investigation revealed that approximately $1100 of the amount had been returned to Lyles by his boss in the narcotic traffic, Gregory Taylor; and that it was discovered that the appellant had returned the money to Taylor who withheld approximately $400 that Lyles owed him prior to giving the remainder of the money to Lyles. The particulars of the charge are substantiated by the testimony given by Sergeant Crain, IRS Agent Carr, and Mr. Lyles at the agency hearing. The appellant admits obtaining the money from Sergeant Crain but otherwise his account of the events leading to his obtaining the money and to whom he gave the money differs from that of the witnesses. In light of all the circumstances, the Board considers that the testimony of the witnesses is entitled to the greater credibility.

The appellant asserts that he had not been furnished a citation of any rule, regulation or law he breached by accepting the money and turning it over to Lyles. The thrust of the charge of unethical use of official authority is the appellant's representations in obtaining the money from Sergeant Crain. The appellant indicated that he had never obtained money from local police

in this type of situation before. Sergeant Crain testified that he could not recall ever having turned over money to a U. S. Government agency prior to this time and that the appellant showed him an order which bore the sum of money in question and he (Crain) gave the money to the appellant who signed a receipt. Deputy Regional Director John Kelly who was a witness for appellant testified that he had never given any agents working under him authority to collect money from the local police department which had been seized from a defendant in a local police case to be held for the Internal Revenue Service, and if an agent had collected such a sum of money he would be required to document the sum that was involved! The Board finds, as did the St. Louis Region, that charge 1 is sustained by a preponderance of the credible evidence.

Under charge 2, submission of false information in connection with the conduct of official business, it is related that about July 22, 1967 the appellant visited James Darst, Chief Assistant Circuit Attorney for the City of St. Louis, and advised that the State should drop charges against Gregory Taylor who had been arrested on that date for possession of narcotics; that appellant stated that Taylor was an essential witness for the Government as well as an informant and that a number of pending cases depended solely upon his testimony; and that the appellant had provided two lists of cases purporting to be cases in which Taylor had served as a witness or as an essential informant. It is stated that Bureau records failed to reveal Taylor to be a registered informant but Bureau records showed that his wife, Bernice Taylor, was the informant responsible for initiating 8 of 32 cases on the lists submitted by the appellant, and that persons other than Taylor or his wife were the informants on the remaining 24 cases on the lists. It is further stated that in accordance with 31 CFR O.735.54 employees shall avoid making false, misleading, or ambiguous statements, deliberately or willfully, whether verbal or written, in connection with any matter of official interest. The record contains copies of the two lists,

marked Government Exhibits 1 and 2, and the fact that the appellant furnished these lists to the office of the First Assistant Circuit Attorney is admitted by the appellant. At the agency hearing Mr. Darst identified Exhibit 1 and Mr. Leo McDonald, who was First Trial Assistant in the County Attorney's office at the time appellant requested leniency for Taylor, identified Exhibit 2 as having been received from the appellant and turned over to Inspector Robert Goe. Mr. Goe confirmed that he received the lists from the former witnesses and his testimony as to what his examination of the 32 cases revealed was consistent with the information set forth in the charge.

The appellant's main contention regarding charge 2 has been that the agency's reliance on Mr. Goe's testimony, rather than producing the case files, to support the charge that the appellant had misrepresented Taylor's status as an informant violated the most basic rules of evidence. This argument is considered to be without merit. The record shows that the agency hearing officer had ruled that in the event the appellant contested Mr. Goe's testimony relative to the number of cases in which Bernice Taylor or Gregory Taylor was listed as the informant, the files would be produced for the purpose of impeaching Mr. Goe's testimony. The appellant did not question the accuracy of Mr. Goe's testimony. The Board finds, as did the St. Louis Region, that charge 2 is sustained by a preponderance of the credible evidence.

Charge 3, unauthorized disclosure of official information, alleges that during March 1968 the appellant contacted Andrew Lyles and notified him that Federal agents of the Bureau of Narcotics had succeeded in having an informant and an undercover police officer purchase narcotics from Lyles' associate, Treona Kurtz, at Lyles' home, thereby alerting Lyles that a narcotic investigation was being conducted concerning him and his associates. It is stated that disclosure of information is restricted under 31 CFR 0.735-47 and 31 CFR 1.9. At the

agency hearing Mr. Lyles testified that he received a telephone call from the appellant who told Lyles "to get those girls out of my house and clean up" because Treona had made a sale to Federal agents; that he recognized the appellant's voice because he had known the appellant for two years; that upon leaving the house he noticed Agents Engelking and Stamm nearby in a blue Oldsmobile; and that he telephoned the appellant regarding the presence of Agents Engelking and Stamm, and that he named the car that agents were in, in response to question from the appellant who said "that's them." Lyles did not recall the date of the conversation with the appellant. The testimony of Agent Engelking is that on March 6, 1968 he and Agent Stamm together with officers of the St. Louis Police Department effected a purchase of heroin from Treona Curtis, Valerie Thomas and Andrew Lyles at the latter's home; that a subsequent purchase was made at Lyles' home on March 7, 1968; that approximately one week later he and Agent Stamm were in a 1965 dark blue Oldsmobile sedan and were stopped for a traffic light when they saw Lyles driving on the intersecting street, and that Lyles looked at them and came close to colliding with the car in front of him. Mr. Engelking stated that approximately 17 days after the March 7, 1968 purchase Lyles was arrested at the airport. The appellant has denied this charge. He stated that if he had alerted Lyles, he (appellant) was certain that Lyles would not have been involved with another sale to the same informant and would not have been transporting narcotics from New York (apparently refers to the arrest at the airport).

The thrust of charge 3 is the telephone call that appellant is alleged to have made to Lyles. The supporting evidence on this point depends on the testimony of Lyles. Agent Engelking has corroborated Lyles' testimony that he (Engelking) and Agent Stamm had been in Lyles' neighborhood, and that their car was of the make and color mentioned by Lyles. Agent Engelking testified that narcotics were purchased at Lyles' home on two consecutive days, March 6 and 7. In evaluating the

evidence, it is not a question of whether the word of Lyles or the appellants should be given more weight but rather whose testimony, in light of all the circumstances, is entitled to the greater credibility.

In the opinion of the Board, the circumstances tend to support the testimony of Lyles. Therefore, the Board finds, as did the St. Louis Region, that charge 3 is sustained by a preponderance of the credible evidence.

Decision

As a result of a thorough review of the appellate record, the Board has concurred in the findings of the Commission's St. Louis Region that the Department of Justice complied with all procedural requirements in effecting the removal of Mr. Richard M. Patch from the service and that his removal, based on the sustained reasons, is shown to have been for such cause as will promote the efficiency of the service. Accordingly, the decision of the St. Louis Region, U. S. Civil Service Commission, dated August 29, 1969 is affirmed.

Under the Civil Service regulations the decision of the Board exhausts the appellant's appeal rights within the Commission.
For the Commissioners:

/s/ William P. Berzak
William P. Berzak
Chairman

December 11, 1969

ADDENDUM III

United States Civil Service Commission
St. Louis Region
St. Louis, Missouri

August 29, 1969

Appeal of Richard M. Patch

Under Part 752 (B) of the Civil Service Commission Regulations

Introduction

By letter dated June 3, 1969, Mr. Richard M. Patch appealed to this office from the action whereby the Bureau of Narcotics and Dangerous Drugs, Department of Justice, removed him from his position of Criminal Investigator, GS-12, at $12,986.00 per annum, with duty stations at Kansas City, Missouri, effective May 23, 1969.

Basis for Acceptance of Appeal

The record shows that Mr. Patch completed a probationary or trial period. The decision to remove him as an adverse action within the meaning of that term as used in Civil Service Regulation 752, Subpart B.

An agency hearing was held on the proposed adverse action on April 22, 1969, in St. Louis, Missouri. The agency Hearing Examiner summarized the hearing and made findings of fact. The appellant took exception to the findings of fact and recorded his objections thereto. The appellant's appeal to the

St. Louis Civil Service Region was received June 3, 1969, within fifteen days following his receipt of the agency's decision letter. Accordingly, his appeal was accepted.

Development of the Evidence

Investigation was conducted intermittently from June 3, 1969, to July 22, 1969. During the course of the investigation, Mr. Patch was advised of his right to a CSC hearing in connection with his appeal. At his request, a hearing was conducted on July 22, 1969, at St. Louis, Missouri.

Examination of Procedures

The notice of proposed adverse action was dated March 7, 1969 and was signed by Mr. N. B. Coon, Assistant Director for Administration, Bureau of Narcotics and Dangerous Drugs. The notice states the reasons for the proposed action specifically and in detail, providing Mr. Patch a fair opportunity to reply. He was given a reasonable period of fifteen days in which to reply. The appellant replied by letter dated March 12, 1969, in which he reserved his option to request a hearing prior to the agency decision. By letter dated March 18, 1969, Mr. Patch requested that a hearing be held on the proposed adverse action. A hearing was held on April 22, 1969, at St. Louis, Missouri. Following agency consideration of the written reply and the summary and findings of fact of the agency hearing and the appellant's written exceptions thereto, the appellant was advised by letter dated May 20, 1969, of the final decision. The notice of decision, signed by Mr. N. B. Coon, advised the appellant of the reasons finally relied upon for taking the action and of his right to appeal. In his appeal letter of June 3, 1969 and subsequently in the Civil Service Commission hearing, the appellant questions the intrabureau administrative procedures

under which the agency hearing was held and final decision made. He points out that charges were made against the employee, appointment was made of a hearing officer, and the final decision was rendered, all by the same individual, Mr. N. B. Coon. In short, says the appellant, "Mr. N. B. Coon is the prosecutor initiating the charges or complaint against the employee, and he is also the judge making the final ruling thereon." The procedure is well within the limits of the agency and Commission regulations concerning the processing of adverse action cases. While we would agree with the appellant that an enhancement of the outward appearance of fairness is achieved by the involvement of several levels of management in the various steps of the process, the procedure used in this case appears to have resulted from an attempt by the agency to reserve all decisions relative to adverse actions, including the initiation of proposed action, at the level of Assistant Director for Administration, rather than delegating the authority for taking such actions to lower levels. Obviously, the drawing up of the charges and other steps would have been executed at lower levels but the agency required the final review and approval of each step, by the Assistant Director. This is an effective management means of assuring that top level attention is given to important decisions regarding adverse actions. I do not find that it is prejudicial to the appellant's basic rights. In the light of the above, the appellant was given the required thirty days advance written notice; the appeal falls within the purview of Civil Service Regulation Part 752, Subpart B; and the procedural requirements of the regulations have been met.

Charges and Analysis of the Evidence

The agency makes three charges against the appellant upon which it relied in making its final decision.

Charge 1 is: "Unethical Use of Official Authority." Mr. Patch is charged with obtaining, from Sgt. Crain of the St. Louis

Police Department, $1525.24 cash which had been in the possession of Mr. Andrew Lyles at the time of Lyles' arrest by the Police Department and giving the money to Mr. Gregory Taylor who subsequently returned most of the cash to Mr. Lyles. The agency cites the absence of any delegated authority to collect or receive any sums of money which had been seized in arrests made by the St. Louis Police Department.

Substantiation of the agency's charge is provided by the testimonies of Sergeant Crain and Andrew Lyles. Sergeant Crain indicates that the money was tendered to Agent Patch upon Agent Patch's initiation. Mr. Lyles testified that he received the money from Mr. Gregory Taylor who told Mr. Lyles that the "boss" had gotten the money back from him. To Mr. Lyles, the "boss" meant Agent Patch.

The appellant acknowledges receipt of the money but his testimony is at variance with the testimonies of Lyles and Crain in that the appellant claims that Sergeant Crain contacted him at the request of Lyles and that Sergeant Crain asked that Mr. Patch communicate with IRS and determine from them if they would seize the money from Lyles. He further states that Sergeant Crain requested him (Patch) to return the money to Lyles and that he (Patch) turned the full amount over to Lyles personally. He emphatically denies giving the money to Gregory Taylor. The appellant's testimony is also contradictory to the testimony of Mr. Richard Carr of Internal Revenue Service in that Mr. Carr testified that he had no recollection of speaking with Agent Patch on the day in question and his diary reflects no conversation with Agent Patch on that date, while Agent Patch testifies that he conferred with Agent Carr relative to the money on that morning.

The appellant questions the reliability of the testimony of Mr. Lyles, "an admitted dope peddler, six times convicted felon and twice convicted narcotics violator," and Sergeant Crain, whose

creditability he questions because of the Sergeant's identification of Agent Patch as "FBI." He further questions the value of the testimony of Agent Carr alleging that his testimony should have been stricken from the hearing record based on the refusal of the hearing examiner to allow the employee or his attorney to inspect the Agent's diary, with which the Agent stated that he had refreshed his memory approximately 45 minutes before testifying. While raising questions as to the conflict with the appellant's testimony contained in the testimonies of these witnesses, the appellant failed to introduce any evidence which would indicate that Agent Carr or Sergeant Crain had any motive to testify falsely. By presenting the testimony of United States Deputy Marshal Vernon Whitlock, the appellant attempts to establish a motive for false testimony from Mr. Lyles. Mr. Whitlock stated that he heard Lyles curse Agent Patch and that he (Mr. Whitlock) gained the impression that "Lyles wanted to get even with Special Agent Patch." Notwithstanding the questions raised regarding the veracity of Mr. Lyles' testimony, corroboration of salient portions of his testimony is made by Sergeant Crain (e.g., that Lyles did not request Crain to call Patch) and the testimony of Agent Carr contradicts the appellant's story. The preponderance of the evidence supports the allegation against the appellant. The charge is sustained.

Charge 2 is: "Submission of False Information in Connection with the Conduct of Official Business." The appellant is charged with intervening on behalf of Mr. Gregory Taylor who had been charged by the St. Louis Police Department on July 22, 1967, with possession of narcotics. The appellant is alleged to have advised Mr. James Darst, First Assistant Circuit Attorney for the City of St. Louis, that Mr. Taylor was an essential witness for the Government, as well as an informant, and that it was necessary that Mr. Taylor be available to the Government for assistance in a number of pending cases which depended solely upon his testimony. The appellant is alleged to have provided

Mr. Darst's office with two lists of cases purported to be those cases in which Mr. Taylor had served as a witness or an essential informant. The charge further states that records reveal that Mr. Taylor was on Federal probation at that time and that agency regulations state that persons on probation cannot be used as informants without consent of the probation office and authorization of the District Supervisor. In sworn testimony, a Bureau Inspector stated that records revealed that Gregory Taylor was not himself an informant responsible for the initiation of any of the 32 cases on the list and that Mr. Taylor's wife, Bernice, was the informant responsible for initiating eight of the 32 cases.

The testimony of Mr. Darst and the lists referred to in the charge were presented to substantiate the agency's allegations. In his letter of March 12, 1969, the appellant stated that he furnished the lists to Mr. Darst's office after reviewing the files in question but states that "not having access to these files now, I am at a loss to furnish information as to why credit initiation of 32 cases was given to the Taylors." The agency used the testimony of Inspector Goe who had examined the 32 case files in question to establish that Bernice Taylor was listed as the informant in eight of the cases and that Gregory Taylor was not listed as an informant in any of the cases, nor, according to Bureau regulations, was he eligible to be utilized as such since he was on Federal probation.

The appellant argues that, since the 32 files referred to in the charge were not made available to him for review, the charge is invalidated. The agency used the testimony of Inspector Goe as an Inspector who had examined the contents of the 32 files for the purpose of determining whether Mr. Taylor had been an informant in the cases and made the witness available to the appellant for cross-examination at the agency hearing. The hearing examiner does not find that this is an unreasonable method for the agency to use in presenting the information relative to the contents of the files.

The appellant takes exception to the findings of fact relative to Charge 2 following the agency hearing. He notes that the hearing examiner found that the incident occurred on approximately July 22, 1967, while testimony of Mr. Darst is that the incident occurred in September, 1967. While the agency hearing examiner does not specifically so state, his findings were necessarily based on evidence already contained in the file as well as testimonies presented at the hearing. Included in the documents in the file is the March 12, 1969, letter of the appellant in which he states, "On the afternoon of July 24, 1967, I conferred with Chief Trial Assistant, Leo McDonald, and Assistant Circuit Attorney, James Darst, regarding Gregory Taylor and Bernice Taylor." While the finding of fact may be inconsistent with the dates in the testimony of Mr. Darst, it is not necessarily inconsistent with the entire record to which the hearing examiner had access. The more important aspect of the finding is that evidence indicates that a meeting did take place and that the lists were presented to Mr. Darst's office.

I find that the agency has sufficiently proved that the appellant intervened on behalf of Gregory Taylor and in so doing furnished false information to the office of Mr. Darst. The charge is sustained.

Charge 3 is: "Unauthorized Disclosure of Official Information." The appellant is charged with notifying Andrew Lyles by telephone that Bureau agents had purchased narcotics from Lyles' associate at Lyles' home and that the appellant had thereby alerted Lyles that a narcotic investigation was being conducted concerning him and his associates. The agency cites regulations which restrict disclosure of information orally when such information would give the persons advantages not accorded to other citizens.

The agency presented the testimony of Andrew Lyles that Agent Patch had notified him that Treona Curtis had made a sale of

narcotics to Federal agents. The appellant denies the charge completely. He again questions Mr. Lyles' varacity as a witness, pointing out that portions of Lyles' testimony are contradicted by other witnesses in the case: "Lyles stated that he had requested that Sergeant Crain place a phone call to Richard Patch on his behalf, while Sergeant Grain states unequivocally that no such request was ever made of him." (The summary of Mr. Lyles' testimony at the agency hearing does not contain any statement to the effect that he asked Sergeant Crain to call Agent Patch. The only reference to this alleged request is contained in the testimony of the appellant.); "Lyles testified that he at no time made any statement reflecting animosity toward Agent Patch or a desire or expectation on his part to have Agent Patch keep him from going to the penitentiary." This is in conflict with the testimony of U. S. Marshal Whitlock who testified that it was his (Whitlock's) impression from what Lyles said to him, although he could not remember specifically what he said, that Lyles wanted to get even with Special Agent Patch (from the agency hearing summary.) This issue reduces to a conflict between the testimonies of Andrew Lyles and Agent Patch. The agency, however, pointed out that Agent Engelking had corroborated the make and color of the car in which Witness Lyles had testified he had observed the agents at the time of the alleged telephone conversation. It is the finding of the hearing examiner that the appellant has not established sufficiently that Mr. Lyles had motive to testify falsely in the proceedings and, despite the appellant's denial, the preponderance of the evidence supports the allegation against the appellant in this charge. The charge is sustained.

Findings and Recommendations

The position of Criminal Investigator in the Bureau of Narcotics and Dangerous Drugs is one which requires that the incumbent at all times be above reproach in his personal conduct and in

the performance of his official duties. The appellant's conduct which gave rise to charges one and two raised a question in his superiors' minds about his willingness to act within the scope of his authority; in fact the appellant demonstrated a tendency to exceed his authority. The conduct involved in charge two also surfaced a question of the appellant's truthfulness in his performance of his duties. The conduct involved in charge three extended the same concern and demonstrated performance in conflict with the objectives of the agency. The serious nature of the three sustained charges against the appellant in this case is such that the effectiveness of the individual in the performance of his official duties has been seriously impaired. The severe penalty of removal is found to be warranted in this case.

Based on all the evidence presented in this case, we find that the adverse action of the Bureau of Narcotics and Dangerous Drugs in removing the appellant from his position was not unreasonable, arbitrary, or capricious, but was for such cause as will promote the efficiency of the service within the meaning of Civil Service Regulation 752, Subpart B. Accordingly, it is recommended that no change be made in the action taken by the agency.

Notification of a Further Appeal

Unless this decision is further appealed within fifteen (15) calendar days of the day it is received, it becomes the final decision of the Civil Service Commission. Two copies of any further appeal should be addressed to the Board of Appeals and Review, U. S. Civil Service Commission, Washington, D. C. 20415. Since a further appeal does not include the right to a hearing, as stated in the attached CSC Form 942, before the Board of Appeals and Review, any representations which the Board should consider beyond those now in the appeal file must be submitted in writing. Please send two copies.

Please notify this office of the filing of any further appeal so that the appeal file can be sent promptly to the Board.

For the Regional Director:

s Billy J. Brown
Billy J. Brown
Acting Appeals Officer

ADDENDUM IV

United States Department of Justice
Bureau of Narcotics and Dangerous Drugs
Washington, D.C. 20537

May 20, 1969

Mr. Richard M. Patch
Special Agent
Bureau of Narcotics and Dangerous Drugs
Kansas City Regional Office

Dear Sir:

My letter of March 7, 1969, informed you of a proposal to discharge you from your position of Criminal Investigator with this Bureau.

I have given full consideration to your letter of March 12, 1969, responding to these charges, to the findings of fact set forth in the Hearing Officer's report dated May 7, 1969, a copy of which is attached, and to Mr. William B. Kelleher's letter of May 15, 1969, which notes exceptions to the Hearing Officer's report. As a result, I have determined that all three of the charges set forth in my letter of March 7, 1969, have been found sustained for the reasons described in that same letter except as follows: Under the Charge No. 2, my letter of March 7, 1969, indicates that Mr. Gregory Taylor was not a registered informant of this Bureau. Evidence produced at your hearing shows that Mr. Taylor had been regarded as an informant because of information received from him although he did not actively participate in any cases to cause him to become a "registered informant." However, this evidence does not defeat the charge, which states that you submitted false information in connection with the conduct of official business.

You did advise Mr. James Darst that Mr. Taylor was an essential witness for the Government in a number of pending cases. The hearing revealed no such cases. I find, therefore, that your removal to promote the efficiency of the service is warranted. It is my decision, therefore, that you be removed effective close of business, May 23, 1969.

You have a right to appeal this action to the Director, BNDD, or *to the Director, St. Louis Region, U. S. Civil Service Commission*, 1256 Federal Building, 1520 Market Street, St. Louis, Missouri, 63103; or first to the Director, BNDD, and then to the Civil Service Commission in accordance with the following: If you appeal first to the Civil Service Commission, you will not have the right to appeal to the Director, BNDD. In order for your appeal to be considered by the Commission, it must (a) *be in writing*, (b) *give your reasons for contesting the removal*, with *such offer of proof and pertinent documents as* you are able to submit, and (c) be submitted no *later than 15 calendar* days after the effective date of your removal.

If you appeal first to the Director, BNDD, you will not be entitled to appeal to the Commission until after a decision on your appeal to the Director, BNDD is made. If, however, no decision on the appeal has been made within 60 days after it was filed, you may elect to terminate your appeal to the Director, BNDD, by appealing to the Commission. An appeal to the Director, BNDD, must (a) be in writing, (b) give the basis for your appeal, and (c) be submitted no later than 15 calendar days after the effective date of your removal. Mr. William Needels, Administrative Officer, Kansas City Regional Office, BNDD, will give you all available information about the appeals procedures if you so desire.

Sincerely yours

/s/ N. B. Coon
Assistant Director
for Administration

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-328

RICHARD M. PATCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner brought this suit in the United States Court of Claims, seeking money damages, back pay and reinstatement to his former position as a Criminal Investigator (GS-12) in the Bureau of Narcotics and Dangerous Drugs of the Department of Justice. The Bureau removed petitioner from federal service in May 1969, pursuant to the provisions of the Lloyd-LaFollette Act, 5 U.S.C. 7501, after sustaining three administrative charges against him involving the transfer of money obtained by law enforcement officers in a narcotics case: (1) unethical use of official authority; (2) submission of false information in connection with the conduct of official business; and (3) unauthorized disclosure of official information (see Pet. App. A-22 to A-23). The Bureau's action was affirmed by the Civil Service Commission on petitioner's administrative appeals (Pet. App. A-3 to A-21). The Court of Claims entered summary judgment for the United States on judicial review (Pet. App. A-1 to A-2).

Petitioner advances a variety of contentions in this Court, challenging the procedures utilized to effect his separation from employment with the Bureau of Narcotics and Dangerous Drugs. These contentions are not well founded, and none of them warrants further review by this Court.

1. Petitioner argues here, as he did below, that his discharge deprived him of procedural rights guaranteed by 28 C.F.R. 47.10 (1969), 5 C.F.R. 771.214 (1969), and the Due Process Clause of the Fifth Amendment, because the person proposing his removal also appointed the Department of Justice hearing examiner and made the initial decision to remove petitioner from federal service.

Petitioner first claims (Pet. 9-10) that this case falls within the ban of 28 C.F.R. 47.10(d) (1969), prohibiting the official making an initial adverse personnel decision from also deciding an administrative appeal within the Department of Justice. The argument is that petitioner's notice of proposed removal should be treated as an initial adverse personnel decision, and the Bureau's initial decision should be treated as a decision on administrative appeal. This claim is not supported by the statute and regulations.

Department of Justice regulations expressly provide that the initial decision to remove a departmental employee from federal service should be made only after a pretermination hearing. Although a pretermination hearing is not required by the statute, the provision of a hearing is a valid exercise of discretion under

the statute.[1] See, *Arnett* v. *Kennedy*, 416 U.S. 134, 224 (dissenting opinion of Mr. Justice Marshall). Accordingly, the notice of proposed removal was just that, and nothing more. It was therefore entirely proper under 28 C.F.R. 47.10(d) for the official issuing that notice to make initial post-hearing removal decision. That procedure is, moreover, constitutionally adequate where, as here, the discharged employee is entitled to receive a later hearing before the Civil Service Commission. *Arnett* v. *Kennedy, supra,* 416 U.S. at 155, n. 21 (plurality opinion of Mr. Justice Rehnquist), and at 170, n. 5 (concurring opinion of Mr. Justice Powell). See also *Nelson* v. *Kleppe,* C.A. 5, No. 73-3337, decided May 28, 1974; *Studemeyer* v. *Macy*, 321 F. 2d 386 (C.A. D.C.), certiorari denied, 375 U.S. 934. Moreover, the Bureau official making the initial adverse personnel decision here had no personal interest in the underlying dispute in petitioner's case. Cf. *Arnett* v. *Kennedy,*

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[1] 5 U.S.C. 7501(b), governing discharge from the competitive civil service, provides in part that "[e]xamination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay." The Civil Service Commission's regulations (5 C.F.R. 771.201 *et seq.* (1969)) state that a tenured employee in the competitive civil service, with exceptions not pertinent here, "is entitled to a hearing on his appeal before a hearing committee" 5 C.F.R. 771.213(a) (1969). The regulations further provide (*ibid.*):

> The hearing may precede either the original decision or the appellate decision, at the agency's option. Only one hearing shall be held unless the agency determines that unusual circumstances require a second hearing.

The Department of Justice, acting pursuant to 5 C.F.R. 771. 213(a) (1969), has promulgated regulations governing the conduct of hearings and providing that "[t]he hearing shall be conducted *prior to a decision on the proposed adverse action* and shall, whenever practicable, be held near the employee's place of work." 28 C.F.R. 47.8(a) (1969) (emphasis added).

supra, 416 U.S. at 198-199 (dissenting opinion of Mr. Justice White). Nor did petitioner request this official to recuse himself or to appoint another officer to act in his place.

2. Petitioner's arguments (Pet. 2-3, 11, 12) attacking the nature of the evidence submitted at the Civil Service Commission hearing, and the absence of a verbatim transcript of the Bureau's pre-termination hearing, were not raised before the Civil Service Commission Board of Appeals and Review. They are, therefore, not appropriately presented to this Court. See, *e.g., Haynes* v. *United States,* 418 F. 2d 1380, 1382-1383 (Ct. Cl.). There is in any event no merit in petitioner's arguments. The decision entered by the Regional Office of the Civil Service Commission, after a hearing, indicates that the Commission carefully considered not only the testimony adduced during the pre-termination hearing before the Bureau, but also the additional evidence which petitioner submitted to the Commission (see Pet. App. A-15 to A-19). Petitioner never requested the Commission to produce witnesses for confrontation or cross-examination, and it was not improper for the Commission to decide petitioner's administrative appeal on the basis of documentary evidence (see, *e.g., Richardson* v. *Perales,* 402 U.S. 389; *DeNigris* v. *United States,* 169 Ct. Cl. 619, 622-623). Furthermore, contrary to petitioner's assertions (Pet. 12), the making of a tape-recording plainly does not constitute an election by the Bureau to prepare a verbatim transcript rather than a written summary of the pre-termination hearing under 5 C.F.R. 771.217 (1969). The Bureau acted properly, under the applicable regulation, in submitting written summaries of the pre-termination hearing to the Commission. See, *e.g., Sullivan* v. *United States,* 416 F. 2d 1277, 1280 (Ct. Cl.).

3. Petitioner's next contention, properly rejected by the court below, is that Inspector Goe's testimony at the pre-termination hearing concerning the contents of 32 documents in the Bureau's files violated evidentiary rules, the procedural guarantees of 5 U.S.C. 7501, 5 C. F.R. 771.215 (1969), 28 C.F.R. 47.7 and 47.8 (1969), and petitioner's constitutional rights of confrontation and cross-examination. The testimony of Inspector Goe related to the charge that petitioner submitted false information in connection with the conduct of official business, by advising state law enforcement officers that one Gregory Taylor was an essential government witness and informant in a number of pending criminal cases and that State criminal narcotics charges against Taylor should therefore be dropped (see Pet. App. A-8 to A-9). Inspector Goe testified that his examination of the Bureau's files showed that Gregory Taylor or Bernice Taylor were listed as informants in only 8 of the 32 cases which petitioner had listed for state officials as cases in which Gregory Taylor had served as a witness or essential informant (see Pet. App. A-8, A-17).

The administrative record shows that the hearing examiner for the Bureau ruled that, if petitioner wished to contest Inspector Goe's testimony concerning the number of cases in which Gregory Taylor or Bernice Taylor was listed as an informant, then the Bureau's files would be produced for the purpose of impeaching Inspector Goe's testimony (CSC admin. file, pp. 130-131).[2] However, petitioner chose not to challenge Inspector Goe's testimony on this point. Thus the Court

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[2]"CSC admin. file" refers to the certified administrative record of proceedings before the Civil Service Commission.

of Claims correctly held that petitioner "failed to cross-examine on this point even when the opportunity to inspect some 32 files in question was provided" (Pet. App. A-2). Since Inspector Goe's testimony was not disputed by petitioner, the Bureau's files were not "pertinent records" within the meaning of 5 C.F.R. 771.215(b) (1969) and 28 C.F.R. 47.8(b) (1969), and there was no constitutional, statutory or regulatory requirement that the files be produced. The Justice Department's governing regulations, 28 C.F.R. 47.8(c) (1969), do not require adherence to the rules of evidence in pre-termination hearings. In particular, hearsay evidence has long been admissible in administrative proceedings. See, *e.g., Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197; *Richardson* v. *Perales,* 402 U.S. 389.

4. Petitioner maintains finally (Pet. 3) that his removal from federal service was arbitrary and capricious and not supported by sufficient evidence. The written decisions of the Bureau and the Civil Service Commission, upon which we rely, show that there is no merit in this purely factual contention (see Pet. App. A-3 to A-23).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.